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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1940

CITY OF INDIANAPOLIS, et al.,  
*Petitioners and Appellers below,*

*v.*

THE CHASE NATIONAL BANK OF THE CITY OF  
NEW YORK, TRUSTEE, ETC., ET AL.,  
*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

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## ABBREVIATIONS

The following abbreviations will be used in the petition for a writ of certiorari and in the brief:

City of Indianapolis, when referred to alone: "City"

City of Indianapolis and the Individual members of the Board of Trustees and Directors, when referred to collectively: "Petitioners"

Chase National Bank of the City of New York, Trustee, when referred to alone: "Chase"

Citizens Gas Company of Indianapolis, when referred to alone: "Citizens Gas"

The Indianapolis Gas Company, when referred to alone: "Indianapolis Gas"

When Chase, Citizens Gas and Indianapolis Gas are referred to collectively: "Respondents"

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1940

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No. ....

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CITY OF INDIANAPOLIS, a Municipal Corporation of the State of Indiana, A. DALLAS HITZ, EDWARD W. HARRIS, CHARLES RAUH, MERLE SIDENER, AND THOMAS D. SHEERIN, as Members of the Board of Trustees for Utilities for Said City, and HENRY L. DITHMER, BRODEHURST ELSEY, ROY SAHM, DONALD J. ANGUS, ISAAC E. WOODARD, LEROY J. KEACH, AND JOHN E. OHLEYER, as Members of the Board of Directors for Utilities of Said City.

*Petitioners and Appellees below,*

*v.*

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee; CITIZENS GAS COMPANY OF INDIANAPOLIS, appellees below, THE INDIANAPOLIS GAS COMPANY, appellant below,

*Respondents.*

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

---

TO THE HONORABLE THE SUPREME COURT OF  
THE UNITED STATES:

The City of Indianapolis, a municipal corporation of the State of Indiana, and the members of its Board of

Trustees for Utilities, viz: A. Dallas Hitz, Edward W. Harris, Charles Rauh, Merle Sidener and Thomas A. Sheerin and the members of its Board of Directors for Utilities, viz: Henry L. Dittmer, Brodehurst Elsey, Roy Sahn, Donald J. Angus, Isaac E. Woodard, LeRoy J. Keach and John E. Ohleyer, respectively petitioning show to the Court:

## I.

## SUMMARY STATEMENT OF MATTERS INVOLVED

## A. Nature of the Actions and De rees Below.

In earlier litigation, the property owned by Citizens Gas was held to be the corpus of a public charitable trust created for the benefit of the gas users of the City.<sup>1</sup>

*Todd v. Citizens Gas Co.*, 46 F. (2d) 855.

This is a suit in equity commenced against petitioners, impleaded with Indianapolis Gas and Citizens Gas by Chase.

Chase, as Trustee (R. 4) under a mortgage to secure bonds executed by Indianapolis Gas (R. 4), sought a decree, the main relief requested being a declaration that a lease for 99 years (R. 5, 6, 21) executed by Indianapolis Gas to Citizens Gas on September 30, 1913, (R. 5) was binding upon and enforceable against the City, as successor trustee of a public charitable trust (R. 20, 21, 22), as a claimed assignee of the lease (R. 16, 17) and allegedly because of estoppel (R. 18, 19) and res adjudicata. (R. 8, 9, 10, 11.)

Chase also sought to obtain an injunction requiring the City to make the payments and perform the covenants con-

<sup>1</sup> A prior attempt to create a public charitable trust had failed because the agreements were held to be insufficient for that purpose. *Consumers Gas Trust Co. v. Quinby*, 137 F. 882.

tained in the lease (R. 21, 306); to obtain judgment for unpaid interest and interest on overdue interest on the bonds (R. 21, 301), together with attorneys' fees and expenses (R. 22).

As relief against Indianapolis Gas, Chase asked that the lease be declared a valid obligation and part of the security which it, as trustee, held for the mortgage bonds of Indianapolis Gas; that pending final hearing Indianapolis Gas be enjoined from attempting to impair the lease; that the court declare Chase's rights as trustee are not altered by the temporary agreement (hereafter referred to) between Indianapolis Gas and the City; that the escrowed moneys (hereafter referred to) be declared the property of the bondholders of Indianapolis Gas; and that Chase have interest on overdue interest, its expenses and attorneys' fees (R. 20-22; 259-260).

The District Court entered a decree that Indianapolis Gas was an indispensable party to the relief sought by Chase and 'should be realigned with Chase and that when so realigned there was no diversity of citizenship and Chase's bill was dismissed for want of jurisdiction, no federal question being involved (R. 271).

The Circuit Court of Appeals reversed with opinions (R. 285-292, 293) reported in 96 F (2d) 363. The majority opinion held that although Indianapolis Gas was an indispensable party to the essential question as to whether the lease was binding upon the City (R. 288) and although both Chase and Indianapolis Gas were contending that the lease was enforceable against the City, nevertheless there could be no realignment because on other questions tendered by the complaint there were controversies between Chase and Indianapolis Gas (R. 292).

Petitioners' petition for a rehearing was overruled with-



out opinion (R. 295) and this Court denied certiorari. (305 U. S. 600, 83 L. ed. 381.)

After the case was remanded to the District Court, there was a trial by that court of certain issues on the merits (other issues being reserved for future determination) (R. 321, 322). The District Court made special findings of fact (R. 1160-1190), stated its conclusions of law thereon (R. 1190-1193) and entered a decree that the lease was unenforceable against either City or Citizens Gas (R. 1192, 1193). The District Court entered judgment in favor of Chase against Indianapolis Gas for past due interest but denied interest on overdue interest (R. 1193). The District Court's memorandum opinion is unreported but appears at pages 1122 to 1159 of the record.

Both Chase and Indianapolis Gas appealed to the Circuit Court of Appeals, which reversed the decree of the District Court so far as it held the lease to be unenforceable against the City and in denying interest on interest against Indianapolis Gas and affirmed the District Court in entering judgment for past due interest in favor of Chase against Indianapolis Gas (R. 1281-1306, 1307, 1308).

The Circuit Court of Appeals held that while Citizens Gas as initial trustee of a public charitable trust had no express power to execute a lease for 99 years that it had the implied power to do so, provided the lease was not burdensome in character (R. 1300).

Petitioners, in their answer to the bill, included a counter claim (R. 182-187) in which they directly and specifically put in issue the burdensome character of the lease and alleged that for that reason, among others, Citizens Gas had no right as initial trustee to execute the lease (R. 186).

On January 18, 1939, pursuant to Rule 42(b) of the Rules of Civil Procedure the District Judge entered the

"It is ordered that evidence shall be heard upon the issues as to whether the lease dated September 30, 1913, from the Indianapolis Gas Company to the Citizens Gas Company of Indianapolis is binding upon and enforceable against the City of Indianapolis or any of the property acquired by it from the Citizens Gas Company of Indianapolis on September 9, 1935, or against the Indianapolis Gas Company or against Citizens Gas Company of Indianapolis and whether plaintiff is entitled to judgment for the rental under said lease or for the interest on the First Consolidated Mortgage Five Per Cent Gold Bonds of the Indianapolis Gas Company which has accrued since April 1, 1936, against any of said defendants or said property, with the one exception that evidence shall not be heard therewith but shall be deferred on one certain reason assigned by the City of Indianapolis in its answer, for claimed unenforceability of such lease against it or its said property, viz: that the City as successor trustee of a certain public charitable trust in property of the Citizens Gas Company of Indianapolis had the right as such successor trustee *to refuse and reject an assignment of such lease on the ground that such lease was burdensome and not advantageous to such trust*; reserving the right to make such order or decree as may seem just and appropriate to the Court at any stage of this proceeding.

The trial of all other issues in this case is deferred until the further order of the Court with the right reserved to refer any or all issues to a Master." (Our emphasis). (R. 321, 322.)

The District Court, in its memorandum opinion, pointed out that only part of the issues in the case had been presented (R. 1159).

Counsel for Chase stated in resting his case that, "Of course, there are other issues which are to be reserved for later trial." (R. 475.)

In the petitioners' petitions for a rehearing (hereafter more specifically referred to), they made the express point that since the District Court had reserved the issue of the burdensome character of the lease, that it was a denial of due process of law to refuse the petitioners the right to be heard on this reserved issue.

We quote the following portion of petitioners' petition for a rehearing addressed to the opinion of the Circuit Court of Appeals as modified:

"1. This Court held that a Trustee of a public charitable trust had no right to make a long term burdensome lease; that it incurred liability to the beneficiaries if it did so and that in addition the beneficiaries were entitled to have such a lease set aside. *This Court therefore held that if a showing could be made that the lease was in fact burdensome it could be set aside and yet it has directed a final judgment to be entered against the City which by order of the Court entered without objection or exception by any of the parties was still to have the right to prove the burdensome character of the lease. If every other question raised by this petition for rehearing should be decided adversely to the defendants-appellees we ask that the order of the Court be modified so as to permit the City to have an opportunity to prove the averments of its counterclaim and to have the lower Court determine whether when executed this lease was in fact burdensome.*" (R. 1346.)

"With no opportunity for a hearing on this reserved issue, the defendants-appellees have been denied due process of law as guaranteed by the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States and each of them.

"The right to a hearing extends both to a determination of questions of fact and law by the trial court. The denial of a hearing on either is a denial of due process. The City affirmatively claims

the protection of the Fifth Amendment and the Fourteenth Amendment and each of them." (R. 1346.)

The Circuit Court of Appeals held that Chase was entitled to a coercive judgment for the unpaid and overdue interest represented by the coupons together with five per cent interest thereon from maturity to judgment and five per cent interest on the judgment from entry to satisfaction, which judgment was to be enforceable against the parties in the following order of liability:

(1) The City as successor trustee and the trust property.

(2) Citizens Gas.

(3) Indianapolis Gas. (R. 1306, 1308.)

The Circuit Court of Appeals held that the City was bound by estoppel and res adjudicata by the terms of the lease of September 30, 1913, although admittedly the City never executed the lease (R. 80), was not a party to it; was not named as a party obligated (R. 51-80); was not an assignee (an assignment was tendered and rejected (R. 468)) and no municipal authority having the power to do so ever authorized the execution of the lease, ratified it or agreed to be bound by its terms. (R. 982-986.)

The petitioners filed their petition for a rehearing within the time allowed (R. 1280, 1309) which was denied by the Circuit Court of Appeals without opinion (R. 1336); the Circuit Court of Appeals modified its opinion in unimportant particulars (R. 1335). Petitioners then filed a motion for permission to file a petition for rehearing addressed to the opinion as modified (R. 1340, 1341). The motion was granted (R. 1405). The petition was filed (R. 1341) and denied without an opinion (R. 1405).

All questions here presented were urged on the Circuit Court of Appeals.

## II

## JURISDICTION.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, C-229 (43 Stat. 938; 28 U.S.C. Sect. 347). The decree of the Circuit Court of Appeals on the merits was entered, a petition for rehearing was filed within the time allowed by the rules of said court, to-wit: on June 26, 1940, (R. 1280, 1309) and was denied without opinion on July 19, 1940 (R. 1336). On July 19, 1940 the opinion of the Court was modified. A motion for permission to file a petition for rehearing, addressed to the opinion as modified, was filed on August 7, 1940 (R. 1340, 1341). The motion was granted (R. 1405). The petition for rehearing addressed to the opinion as modified filed (R. 1341) and denied (R. 1405). This petition for certiorari was filed before the expiration of three months from July 19, 1940.

## III

## STATEMENT OF FACTS.

(a) Indianapolis Gas, as lessor, and Citizens Gas, as lessee, entered into a written contract of lease for a term of 99 years (R. 51-80; 55, 77) or for the longest term for which the parties might lawfully contract (R. 80). The lessee was to use and maintain lessor's utility property and to pay as rental the interest upon the lessor's outstanding mortgage indebtedness, being the bonds whereunder Chase is trustee (R. 69-70), also the sum of \$120,000 annually for payment to lessor's stockholders as dividends (subject to increase if the price of gas was decreased) (R. 70), also certain expenses; in default of which payments the lease was terminable (R. 78).

(b) In 1935 all the property of Citizens Gas, except this lease, was transferred to the city (R. 635) in order to perform the terms of the public charitable trust approved in *Todd v. Citizens Gas Company, et al.*, 46 F. (2d) 855 (C. C. A. 7; certiorari denied 283 U. S. 852).

(c) An assignment of the lease was tendered to the City but was rejected by it (R. 468, 202-204).

(d) The City took temporary possession of the property covered by the lease in order to prevent interruption of service to consumers, without prejudice to its rejection of the lease (R. 200) and Indianapolis Gas consented to such temporary possession and operation without waiving any of its rights (R. 17, 204, 205).

(e) The City and Indianapolis Gas then entered into a separate agreement, distinct from the lease, by the terms of which the City was to continue such temporary operation and meanwhile pay into a bank, to be held in escrow, sums equal to the amounts specified in the lease, as compensation for such temporary use of Indianapolis Gas property, until further arrangements could be made, or until the present controversy was finally adjusted or terminated by a decree of court; all without prejudice to the position taken by each party as to the binding effect of the lease on the city (R. 19, 205-208, 257, 261). Payments were accordingly made to and are held by the escrow (R. 258-260, 638).

(f) Chase claimed in its complaint (R. 3-22) that the City was estopped to deny the validity of the 99 year lease by reason of the following:

(1) Findings and orders of the Indiana Public Service Commission on an intervening petition of one Frank S. Fishback (R. 8, 9, 18).

(2) Sale of Indianapolis Gas bonds by Citizens Gas (R. 11, 12).

(3) "The City of Indianapolis and the residents and inhabitants thereof have had the full benefit and advantage of such operations, and of the profits produced thereby and of the protection thus given to the public charitable purposes to which the property of the Citizens Gas Company of Indianapolis were dedicated." (R. 12.)

(4) Sale of revenue bonds and alleged representations made by the City (R. 14, 15).

(5) Claimed assignment by Citizens Gas to the City of the 99 year lease.

(6) The following decisions:

*Fishback v. Public Service Commission*, 193 Ind. 282 (R. 10, 18);

*Todd v. Citizens Gas Company*, 46 F. (2d) 855 (R. 13, 18);

*Williams v. Citizens Gas*, 206 Ind. 448 (R. 14, 18).

Chase also claimed that the foregoing decisions were res adjudicata of the question of the enforceability of the 99 year lease against the City (R. 8, 10, 13, 14).

Interest on overdue interest was asked by Chase.

#### IV

##### THE QUESTIONS PRESENTED.

Upon the record and the opinion of the Circuit Court of Appeals, three important Federal questions are presented.

*First.* Whether the decision of the Circuit Court of Appeals denies to the City due process of law as guaranteed by (a) the Fifth Amendment to the Constitution of the United States; and (b) the Fourteenth Amendment to the Constitution of the United States, in this:



The District Court, by an order entered without objection or exception by any party (the relevant parts of which are set out at page 5 of this petition), reserved for future determination the question of the burdensome character of the lease of September 30, 1913 (R. 321, 322). The Circuit Court of Appeals held (R. 1300) that if the lease were in fact burdensome Citizens Gas, as initial trustee, had no authority to execute the same, but held, without any trial in the lower court, that a certain order (non-judicial in character) of the Public Service Commission of Indiana and a judgment of the Supreme Court of Indiana were *res adjudicata*.<sup>2</sup>

The City was thus denied a hearing in a trial court on the issue of the burdensome character of the lease. The right to such a hearing by the trial court extends both to a determination of the law and the facts.

*Second.* The Circuit Court of Appeals held for the first time in its opinion of June 6, 1940, that Chase was entitled to a coercive judgment enforceable in the following order:

- (1) Against the City as Successor Trustee and the trust property.
- (2) Against Citizens Gas.
- (3) Against Indianapolis Gas. (R. 1308.)

The evidence shows that from the funds deposited in escrow (R. 638) and the funds arising from the operation of the property (R. 542, 543) the City will be required and is abundantly able to pay the entire judgment and that Indianapolis Gas has thus been insulated from liability.

The result of the decision is that a judgment has been ordered entered which is equally beneficial to Chase and

<sup>2</sup> *Williams v. Citizens Gas Co.*, 206 Ind. 448.



Indianapolis Gas and which amounts in effect *not to judgment against Indianapolis Gas but one in its favor.*

The decision of the Circuit Court of Appeals is directly in conflict with controlling decisions of this Court to the effect that parties must be realigned in accordance with their relation to the *main controversy* in the case and the fact that there are dependent controversies in respect of which their interest may be adverse is not sufficient to sustain jurisdiction on the ground of diversity of citizenship, viz:

*Sutton v. English*, 246 U. S. 199, 62 L. ed. 664;

*City of Dawson v. Columbia Trust Co.*, 197 U. S. 178, 49 L. ed. 713.

An examination of the record will show that Chase and Indianapolis Gas are friends attempting to assert hostility only for the purpose of conferring a jurisdiction which would otherwise not exist.

*Third.* The Circuit Court of Appeals wholly disregarded the applicable Indiana law in four important particulars and thus violated the rule established by this court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188 as follows:

1. It impliedly held that the City was bound by the lease by the doctrine of estoppel, although admittedly there was no effort to prove that any present bondholder of Indianapolis Gas knew of any of the acts asserted as the basis of such estoppel, much less relied upon the same, and under a long line of Indiana cases the unauthorized act of a City official cannot be made the basis of an estoppel.

2. It applied the doctrine of res adjudicata to a decision of the Public Service Commission, to a case in which the City had been dismissed as a party before final judgment, to a case in which Indianapolis Gas and Chase were not

parties and to a case in which Indianapolis Gas, a predecessor trustee of Chase and City were defendants and in which neither of said defendants had tendered any issue against the other, although the City had directed the attention of the Court to the fact that whether the lease was valid or invalid was immaterial.

3. It held a municipal corporation liable (presumably out of revenues raised from taxation) for future payments of more than \$45,000,000 under a lease solely because of the implied power of the initial trustee to execute the same although the Indiana law is that all powers granted by a municipal corporation must be strictly construed against the grantee and that nothing passes by implication. Among other things, the holding, in effect, guarantees to the stockholders of Indianapolis Gas 6% interest on their stock for approximately 77 years in the future or until 2013.

It also ordered entered against the City, as first in order of liability, a coercive judgment for interest on overdue interest.

4. Sections 85 and 254 of the Acts of the Indiana General Assembly of 1905 expressly prohibit any such lease for more than 25 years and prohibit its execution without municipal sanction. The Indiana cases hold that any agreement made in violation of these sections is void ab initio and cannot be ratified. The Circuit Court of Appeals held the lease valid for its full term of 99 years, although the lease had no municipal sanction of any kind.

## B

### REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

The Circuit Court of Appeals for the Seventh Circuit has decided three Federal questions in a manner in conflict with the applicable decisions of this court, to wit:

*First.* It has denied the City a hearing and trial on the question of the burdensome character of the lease of

September 30, 1913. The City was entitled to a trial in the District Court on all questions of *fact and law*. Without such hearing the requirements of due process are not satisfied.

*Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292, 81 L. ed. 1093;  
*Brinkerhoff-Faris Trust & Savings Co. v. Hill*,  
 281 U. S. 673, 74 L. ed. 1107.

(a) An attempt by an appellate tribunal to determine the question of *res adjudicata* does not satisfy the requirements of due process.

(b) The City was entitled to be heard in the trial court on both the questions of law and fact as to whether the order of the Public Service Commission of Indiana approving the lease and the Williams case (206 Ind. 448) were *res adjudicata* and whether the lease was in fact burdensome. To refuse such a hearing is to deny due process of law.

*Ohio Water Works Co. v. Ben Avon Borough*, 253  
 U. S. 287, 64 L. ed. 908, 914.

*Requirements of due process are satisfied only by a hearing in the trial court.*

*Second.* The Circuit Court of Appeals has decided that in determining the existence of federal jurisdiction, where that jurisdiction is wholly dependent on diversity of citizenship, it is not the duty of the court to realign the parties in accordance with their interests in the dominant controversy where more than one controversy or issue is tendered, unless they are also in accord upon all other and minor issues; a decision which conflicts with the ruling of this Court in *Sutton v. English*, 246 U. S. 199, 62 L. ed. 664.

*Third.* The Circuit Court of Appeals disregarded the rule laid down by this Court in *Eric Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, in that:

1. It refused to follow the Indiana decisions set out below on estoppel of a City.

*Ross, et al. v. Banta*, 140 Ind. 120, 150;

*Union School Twp. v. First National Bank*, 102 Ind. 464, 476;

*Hosford v. Johnson, et al.*, 74 Ind. 479, 485;

*Platter v. Board*, 103 Ind. 360, 381.

2. It refused to follow the Indiana decisions on the question of res adjudicata, viz:

*Jones v. Vert, et al.*, 121 Ind. 140, 141;

*Maple v. Beach*, 43 Ind. 51, 59;

*Kitts v. Wilson*, 140 Ind. 604, 610.

3. It refused to follow the rule of the Indiana decision set out below that a grant made by a municipality is to be taken most strongly against the grantee and nothing is to be taken by implication against the public and enforced a lease against the City where the right to execute such a lease was based solely on implied power of the initial trustee to execute the same.

*Indianapolis Cable R. R. Co. v. Citizens Street R. R. Co.*, 127 Ind. 369, 390.

And it likewise refused to follow the same rule laid down by this Court in the following cases:

*Piedmont Power & Light Co. v. Town of Graham, et al.*, 253 U. S. 193, 64 L. ed. 855;

*Knorrville Water Co. v. Knorrville*, 200 U. S. 22, 50 L. ed. 355;

*Blair v. Chicago*, 201 U. S. 400, 50 L. ed. 801;

*Mitchell v. Dakota Central Telephone Co.*, 246 U. S. 396, 62 L. ed. 793.

4. It refused to follow the Indiana decisions that a municipal corporation cannot be bound by a contract made in violation of the Indiana statutes.

*Gas, Light, etc. Co. v. City of New Albany*, 156 Ind. 406, 415;

*City of Indianapolis v. Wann, Receiver*, 144 Ind. 175, 187.

The Indiana cases cited above to propositions 1, 2, 3, and 4 are the law of Indiana. There are no Indiana decisions to the contrary. There was thus an *arbitrary refusal* to follow the applicable Indiana law, in violation of the rule established by this Court in *Eric Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188.

*Fourth.* An important public question is involved, viz: whether a municipal corporation shall have imposed upon it an obligation for 77 years in the future aggregating more than \$45,000,000 in amount under a lease without any municipal sanction, where the Court does not limit the payments of the obligation to the revenues arising from the operation of the plant, but presumably imposes the burden on revenues raised by taxation. Important too because a coercive judgment is ordered entered against a municipal corporation for interest on overdue interest.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein a

full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 7144. *The Chase National Bank of the City of New York, Trustee, etc. v. The Indianapolis Gas Company, et al.*, and that the decree of said United States Circuit Court of Appeals in said cause be reversed by this Court, and that petitioners have such other and further relief in the premises as to this Court may seem just.

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